(3)

No. 06-1411

In The

Supreme Court of the United States

BARBARA SNOW-ERLIN, as
Representative of the Estate of Darrow K. Erlin,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

REPLY BRIEF

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PETITIONER'S REPLY BRIEF

A. This Case Presents The Straightforward Legal Question Whether Officers Of The Federal Bureau Of Prisons Are Law Enforcement Officers Under The Federal Tort Claims Act, 28 U.S.C. § 2680(h), Allowing Individuals To Recover For False Imprisonment By Law Enforcement Officers

Both the Ninth Circuit and Respondent have failed to apply the plain language contained in 28 U.S.C. Section 2680(h) to Petitioner's claims. This Section explicitly excepts "investigative or law enforcement officers" from the Federal Tort Claims Act's ("FTCA") general grant of sovereign immunity for certain torts, including false imprisonment. See 28 U.S.C. § 2680(h). Although the Ninth Circuit determined that Petitioner suffered false imprisonment (Pet. App. 1-8), the court erroneously held that the FTCA barred Petitioner's claim. *Id.* at 7-8. In so holding, the Ninth Circuit misapplied Section 2680(h) of this Act. Because Petitioner has stated a claim for false imprisonment, and Petitioner's false imprisonment is attributable to "investigative or law enforcement officers," as statutorily defined, the Ninth Circuit should have reversed the district court's dismissal for want of jurisdiction. The circuit court's blatant refusal to recognize this statutory exception directly contradicts the clear Congressional intent to hold federal officers accountable for their tortious conduct, and sets a dangerous precedent for injured parties similar to Petitioner.

Respondent does not dispute the fact of Petitioner's false imprisonment. Br. in Opp. 7. Respondent mistakenly attributes Petitioner's false imprisonment, however, to the United States Parole Commission ("Parole Commission"), whose employees do not qualify as "investigative or law enforcement officers" under Section 2680(h). *Id.* at 8-9. The Parole Commission is not the named defendant in this case, though. Instead, Respondent is the United States, an entity which encompasses both the conduct of the Parole Commission, whose agents negligently miscalculated Petitioner's sentence, and the Federal Bureau of Prisons ("BOP"), whose agents aggregated Petitioner's sentences, wrongfully detained Petitioner for an additional 311 days, and ultimately released Petitioner pursuant to a grant of habeas corpus. In contrast to persons employed by the Parole Commission, agents of the BOP *do* qualify as "investigative or law enforcement officers" under Section 2680(h), as they have the power to make arrests. See 18 U.S.C. § 3050.

Respondent fails to acknowledge the BOP's role in Petitioner's false imprisonment. Instead, Respondent simply alleges, without further explanation or analysis, "Petitioner's contention that Erlin was 'incarcerated by officials of the Bureau of Prisons' is beside the point." Br. in Opp. 9. On the contrary, this contention *is* the point: Petitioner is entitled to reversal by this Court because the Ninth Circuit wrongly disregarded the BOP employee's status as "investigative or law enforcement officers" under Section 2680(h).

Respondent further alleges that Petitioner's argument regarding the "investigative or law enforcement officer" exception is newly raised and thus waived. Br. in Opp. 8. This assertion is simply incorrect for two reasons: first, Respondent itself raised this argument in its Motion for Summary Judgment (see Mot. for Summ. J. 9 ("A claim in this case of false imprisonment by the Parole Commission would be barred by 28 U.S.C. § 2680(h) because neither the professional staff of the Parole Commission nor a Regional Commissioner are investigative or law enforcement officers within the meaning of § 2680(h). These persons have no authority to arrest, conduct searches, or seize evidence.")), rendering Petitioner's argument neither new nor untimely; and second, this argument arises out of a motion to dismiss for lack of subject-matter jurisdiction pursuant to Federal Rule of Civil Procedure 12(b)(1). As both this Court and the Ninth Circuit have held repeatedly, claims involving subject-matter jurisdiction are seldom waived and consequently can be raised at any time. See, e.g., *U.S. v. Cotton*, 535 U.S. 625, 625 (2002); *Shabazz v. Carroll*, 833 F.2d 149, 149 (9th Cir. 1987); *Vun Cannon v. Breed*, 565 F.2d 1096, 1097 (9th Cir. 1977). Thus, Petitioner's argument is not waived and merits reversal by this Court.

B. Immediate Review Is Warranted To Clarify The Scope Of The Federal Tort Claims Act And Give Effect To Congress' Clear Intent To Hold Law Enforcement Officers Accountable For Their Tortious Conduct

The significant practical and doctrinal implications of the Ninth Circuit decision strongly favor a grant of certiorari. Pet. 11-13. Contrary to the Ninth Circuit's and Respondent's assertion that Petitioner raises questions of first impression (Br. in Opp. 6), circuit courts, including the Ninth Circuit, have previously addressed the issue of federal accountability under the FTCA for false imprisonment, as well as for negligence in arresting and sentencing. See, e.g., *Conlon v. United States*, 474 F.3d 616, 619-20 (9th Cir. 2007) (affirming grant of summary judgment in action against United States for negligently issuing warrant leading to arrest and incarceration); *Santoni v. Potter*, 369 F.3d 594, 603 (1st Cir. 2004) (affirming grant of summary judgment in action against United States for false imprisonment under Section 2680(h)). Consequently, the scope of the decision extends well beyond this case.

As Respondent acknowledges (Br. in Opp. 9 n.4), the courts of appeals have disagreed on the applicability of Section 2680(h) to various tort claims. Compare *Pooler v. United States*, 787 F.2d 868, 872 (3d Cir. 1986) (holding waiver of sovereign immunity "limited to activities in the course of a search, a seizure or an arrest"), with *Sami v. United States*, 617 F.2d 755, 764-65 (D.C. Cir. 1979) (stating in dictum

that law enforcement proviso meant to provide tort remedy for "law enforcement abuses" more broadly). Contrary to Respondent's conclusion, however, this confusion among the circuits regarding the extent of Section 2680(h) provides clear evidence of the need for further clarification by this Court.

The Ninth Circuit's holding in this case is directly at odds with Supreme Court dicta, as well as with the majority of federal court rulings in this area, which have held that Section 2680(h) is to be construed broadly in imposing liability on federal law enforcement officers for tortious conduct. See, e.g., *Ortiz v. Pearson*, 88 F. Supp. 2d 151, 164-65 (S.D.N.Y. 2000); *Employers Ins. of Wausau v. United States*, 815 F. Supp. 255 (N.D.Ill. 1993); *Harris v. United States*, 677 F. Supp. 403, 405 (W.D.N.C. 1988); *Crow v. United States*, 659 F. Supp. 556, 570-71 (D. Kan. 1987). In *Dolan v. United States Postal Service*, 546 U.S. 481, 491-92 (2006), this Court warned against the "unduly generous interpretations of the exceptions" to the FTCA, because such interpretations "run the risk of defeating the central purpose of that statute." The Ninth Circuit's opinion in the present case gives an "unduly generous" interpretation of Section 2680(h) inconsistent with statutory, Ninth Circuit, and Supreme Court authority. This interpretation impedes the central purpose of the FTCA, as it denies plaintiffs the ability to recover for torts committed by the United States. Thus, this Court should affirm the approach these courts have taken, in keeping with its own dicta, the plain language of the

statute, and the express legislative intent described in *Sami*, 617 F.2d at 764-65.

The practical problems that will flow from the Ninth Circuit's precedent are neither speculative nor far-fetched. The ramifications of this decision are prevalent not only at an individual level, such as other petitioners who have wrongfully suffered loss of liberty for a year or more due to egregious errors of federal officials, but also on a societal level. The average annual operating cost of incarcerating each State inmate (including facilities operated by the BOP) currently exceeds $20,000. U.S. Dep't of Just., Bureau of Just. Stat. Special Report, State Prison Expenditures, 2001 (June 2004) (reporting that in 2001, average annual operating cost per State inmate was $22,650, or $62.05 per day, and was roughly equivalent for facilities operated by Federal Bureau of Prisons). Such costs are typically borne by the taxpaying public. Furthermore, consider the current disparate circumstances of individuals accused of crimes who are intentionally assaulted by federal law enforcement agents or officers. These individuals have no legal recourse against the federal government for the actions of its agents under Section 2680(h), according to the Third Circuit. These same individuals, however, could seek recovery under Section 2680(h) under the D.C. Circuit's jurisdiction. Because federal liability differs dramatically depending on the jurisdiction in which the tort occurred, review by this Court is necessary to maintain predictability and uniformity in FTCA cases. The issue here accordingly is ripe for review.

C. The Ninth Circuit Erred By Mischaracterizing Petitioner's Negligence Claim, Which Is Wholly Independent Of A False Imprisonment Claim And Is Therefore Permitted Under The Federal Tort Claims Act

In addition to erroneously interpreting the "investigative or law enforcement officer" exception in Section 2680(h), the Ninth Circuit mistakenly barred Petitioner's wholly independent negligence claim. Section 2680(h) clearly permits negligence claims against the United States. Respondent curiously declined to address this issue, opting instead to focus on Petitioner's false imprisonment claim under the "investigative or law enforcement officer" exception. A careful analysis of the statute reveals that Petitioner has stated not only a claim for false imprisonment, *but also* a claim for negligence. Even assuming that the BOP does not qualify as an "investigative or law enforcement officer," Petitioner's contention of negligence against the Parole Commission still stands.

As Respondent has indicated, Parole Commission employees do not have the power to arrest and therefore are not law enforcement officers under Section 2680(h). Br. in Opp. 9. Instead, the government's liability pursuant to the "investigative or law enforcement officer" exception arises from the conduct of the agents of the BOP. In contrast, the Parole Commission's liability to Petitioner stems from its negligence in calculating Petitioner's sentence.

Petitioner's negligence claim against the Parole Commission is wholly independent of the claim for false imprisonment against the BOP. *Senger v. United States*, 103 F.3d 1437, 1441 (9th Cir. 1996) (holding Section 2680(h) does not shield United States from its own "independent negligent acts . . . that are proximate causes of the harm," even when those harms also originate from an excluded intentional tort. As long as negligence claim is based on actions distinct from excluded intentional tort, recovery of all proximately caused damages is allowed under Section 2680(h)). Whereas Petitioner's false imprisonment claim revolves around the fact of his wrongful incarceration by the BOP for an additional 311 days, Petitioner's negligence claim revolves around acts involved in miscalculating his parole period. The evidence illustrating these independent claims is ample. First, the Parole Commission's miscalculation of Petitioner's parole period took place before any actual confinement by the BOP occurred. Second, the Parole Commission and the BOP are comprised of entirely distinct officers, each of whom was independently responsible for the miscalculation and the incarceration, respectively. Finally, the fact of Petitioner's incarceration by the BOP was not a necessary consequence of the Parole Commission's miscalculation. Similarly, it is possible that Petitioner could have suffered the same false imprisonment had the Parole Commission not calculated his sentence negligently.

The Ninth Circuit committed an egregious error by conflating Petitioner's two distinct claims. Although Section 2680(h) allows both claims, Petitioner need only prevail on one. Instead of recognizing the merit of both or either of these claims, however, the Ninth Circuit and Respondent have declined a proper analysis of Section 2680(h), asserting only that "the gravamen of the complaint is a claim for false imprisonment." Pet. App. 8.

Despite its characterization of Petitioner's claim as one for false imprisonment, the Ninth Circuit provided no legal definitional basis for its reasoning. Although Section 2680(h) clearly defines "investigative or law enforcement officers," it leaves open the definition of the various torts listed, including false imprisonment. According to the federal common law definition, which Respondent accepts (Br. in Opp. 7), false imprisonment consists of "confinement *otherwise than by arrest under a valid legal process*." Restatement (Second) of Torts § 35 cmt. a (1965) (emphasis added); see also *United States v. Neustadt*, 366 U.S. 696, 705-06 (1961) (holding excluded torts within 28 U.S.C. Section 2680(h) are defined according to federal law). Under this definition, Petitioner may not even have a claim for false imprisonment. If the BOP incarcerated Petitioner pursuant to a "valid legal process," there is no action for false imprisonment, and Petitioner's claim cannot possibly "arise out of" false imprisonment, as the Ninth Circuit held. Pet. App. 7-8. Instead, what remains is an action for

negligence, which, as mentioned, is clearly permitted under the FTCA. See 28 U.S.C. § 2680(h).

The FTCA holds the federal government liable to the same extent as a private party for certain torts of federal employees acting within the scope of their employment. 28 U.S.C. §§ 1346(b)(1), 2674; *United States v. Orleans*, 425 U.S. 807, 813 (1976). The liability of the United States is "normally coextensive with that of a private citizen." *Ting v. United States*, 927 F.2d 1504, 1514 (9th Cir. 1991). Where the alleged tortious act is one not performed by private citizens (such as making arrests or computing prisoners' sentences), however, the courts look to the actions of state and municipal employees to determine the government's liability. *Id*; *Aguilar v. United States*, 920 F.2d 1475, 1477-78 (9th Cir. 1990) ("in the special circumstances where a federal actor is a police officer without a private analogue, liability is determined by reference to state liability for government employees."); *Doggett v. United States*, 875 F.2d 684, 689 (9th Cir. 1989). Thus, there need not be a perfect "private party" analogue to the tortious federal conduct. See, e.g., *Indian Towing Co. v. United States*, 350 U.S. 61, 64-69 (1955) (holding provision of FTCA imposing liability in same manner and to same extent as private individual under like circumstances does not exclude liability in performance of activities which private persons do not perform"); *Lozada v. United States*, 974 F.2d 986, 988 (8th Cir. 1992) (holding "'like circumstances' inquiry is not overly stringent" and that "FTCA should be interpreted broadly to

effectuate the legislative aim") (citing *Owen v. United States*, 935 F.2d 734, 737 (5th Cir. 1991); *Starns v. United States*, 923 F.2d 34, 37 (4th Cir. 1991)); *Somerset Seafood Co. v. United States*, 193 F.2d 631, 635 (4th Cir. 1951) (holding liability imposed on United States by FTCA is not conditioned on whether damages arose out of exercise of functions which might be carried on by private individuals, but liability embraces so-called "governmental" functions).

The liability of the United States in an FTCA action is determined under the law of the state where the act or omission occurred. *Richards v. United States*, 369 U.S. 1, 11 (1962); *McGraw v. United States*, 281 F.3d 997, 1003 n.2 (9th Cir. 2002); *Will v. United States*, 60 F.3d 656, 659 (9th Cir. 1995). Because California was the place where "the act or omission occurred," California state law governs the United States' liability in this FTCA action.

In order to state a cause of action for negligence under California law, a plaintiff must show: (1) a legal duty to use due care; (2) a breach of that duty; and (3) that the breach was the proximate or legal cause of the injury. *Ting*, 927 F.2d at 1513. Respondent has previously mischaracterized Petitioner's negligence claim, asserting the Parole Commission owed Petitioner no duty to "deaggregate" his 13-year aggregate sentence. See Mot. for Summ. J. 19-23. The Parole Commission's duty, however, is not so specific. *Alexander v. Perrill*, 916 F.2d 1392, 1399 (9th Cir. 1990) (holding "strict factual similarity is not required in order to find that a right or duty is clearly

established. All that is necessary is that a reasonable person would have known that the right or duty exists"). Instead, the Parole Commission owed Petitioner a more broad duty of due care in computing his sentence. A reasonable Parole Commissioner would have known that he was under a duty to compute prisoners' sentences correctly. Furthermore, it is easily foreseeable that a miscalculation in sentence length could potentially lead to wrongful incarceration. The Parole Commission breached its duty by negligently calculating Petitioner's sentence, resulting in Petitioner's wrongfully extended incarceration by 311 days. This breach directly and proximately caused damages to Petitioner, for which Petitioner is entitled to compensation.

The Ninth Circuit's opinion engages neither the false imprisonment nor negligence analysis that is warranted under Section 2680(h) and thus disregards the clear legislative intent behind the FTCA. If Congress had intended to carve out an exception to the waiver of sovereign immunity for negligence, it could have done so. Instead, it specifically and purposely exempted negligence from the realm of tortious conduct for which federal officials may claim immunity. Although Section 2680(a) excludes tort claims arising from the "exercise or performance or the failure to exercise or perform a discretionary function or duty," the Parole Commission's acts and omissions in this case were not of a discretionary nature. 28 U.S.C. § 2680(a). Instead, calculating parole terms and sentences does not involve any policymaking; it is

strictly a ministerial act. Thus, Petitioner stated a valid negligence claim under Section 2680(h). Because the Ninth Circuit's decision subverts clear legislative intent and creates poor precedent by diminishing federal officials' liability for tortious conduct, further review is necessary.

Petitioner respectfully submits that this Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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